RECENT AMERICAN DECISIONS

Supreme Court of Errors of Connecticut.

WILLIAM MORRIS *vs.* DELOS PLATT AND ANOTHER.

A man who is assaulted under such circumstances as to authorize a reasonable belief that the assault is made with a design to take his life, or inflict extreme bodily injury, will be justified, in both the civil and criminal law, if he kill or attempt to kill his assailant.

The question whether the belief was reasonable or not must be passed upon by a jury, but a person does not act in such a case at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true.

It is well settled that a man is not liable in an action of trespass on the case, for an unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him; and there is no reason for a different rule where the injury is immediate and direct, and the action trespass.

Where a person in lawful self-defence fires a pistol at an assailant, and missing him wounds an innocent bystander, he is not liable for the injury if guilty of no negligence.

While this is the result of the application of well-settled legal principles, it is questionable whether, in view of the too general practice of carrying firearms, and the danger to innocent persons from their use, there should not be some legislation changing the rule of law in such a case, or otherwise protecting the public.

It is not the proper course for a judge to lay down the general principles applicable to a case and leave the jury to apply them, but it is his duty to inform the jury what the law is as applicable to the facts of the case.

The facts of a case are to be found by the jury, unless admitted, and the judge can only regard them as claimed, for the purpose of applying the law to them contingently, if found; and he cannot properly refuse to charge upon the facts claimed on the ground that in his opinion they are not proved.

Trespass for an assault. Verdict for plaintiff, and motion for a new trial.

Kellogg, for the motion.

H. B. Munson and *Doolittle*, contra.

The opinion of the court was delivered by

BUTLER, J.—Upon a careful examination of the important questions presented upon this record, I do not see how the omission of the court to charge as requested on the first point, or the charge actually given on the second, can be vindicated, and the verdict sustained.

1. It appears from the evidence offered on the trial that the

defendant wounded the plaintiff in two places by two shots fired from a pistol; and from the nature of the weapon, and the other conceded circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent on the defendant to justify or excuse their infliction. He in the first place attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others in a manner which indicated a design to take his life, and "that he was in great bodily peril and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and his body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff as matter of law, and entitled the defendant to a verdict in his favor. And so the court were bound to tell the jury, if properly requested to do so by the defendant.

The motion further shows that the defendant did in substance request the court to charge, that if they found the fact proved as claimed, he would be justified in self-defence in using the pistol as he did—that the rule of law is "that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life or suffering extreme bodily harm, &c." What a man may lawfully do he may lawfully attempt to do, and that request embodied in substance, and with sufficient distinctness, a well-settled specific rule of law, applicable alike in criminal prosecutions and civil suits and to the facts of the case as claimed.

The court did not conform to the request. The charge as given informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them

proved, the court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this state by statute, that "it shall be the duty of the court to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury to direct them to find accordingly." Rev. Stat., tit. 1, § 144. Here the rule of law applicable to the facts claimed is as well-settled and specific as any rule of law in the books, and it was the duty of the court to give it to the jury as requested, and direct them if they found the facts as claimed to find a verdict accordingly. And if it were otherwise, and a specific rule settled by authoritative adjudications, in which the great principle had been applied to a similar state of facts, did not exist, it would still have been the duty of the court to apply the principle to the facts, and to tell the jury whether or not they furnished a justification in law to the defendant, for that, in the language of the statute, was "a question of law arising in the case."

The first request of the defendant which we are considering involved the finding of two principal facts, viz., first, whether the plaintiff was one of the assailants, and second, whether the assault was made with a design to take the life of the defendant or inflict upon him extreme bodily harm. But the jury might find upon the evidence that the plaintiff was one of the assailants, and fail to find the design to take life imputed to him. To meet such a contingency the defendant added to his request, that the court should charge the jury, "that when from the nature of the attack there is a reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of his assailant will be excusable homicide, though it should afterwards appear that no felony was intended;" but the court did not so charge, because, as the motion states, the court did not consider that the facts of the case required such instructions.

The facts of a case are to be found by the jury unless admitted, and the court can only regard them as claimed, for the purpose of applying the law to them contingently if found. When therefore the motion states that the court did not think the facts of the case required the instruction claimed, as the material facts were in dispute it must be intended that the court was of opinion that there was not any such law as claimed, applicable to the facts as claimed. But in that the court were mistaken. A man

who is assailed, and under such circumstances as to authorize a a reasonable belief that the assault is with design to take his life, or do him extreme bodily injury which may result in death, will be justified in the eye of the criminal law if he kill his assailant, and in an action of trespass, if he unsuccessfully attempt to kill him, and he surviving brings his action, for the killing would have been lawful and of course the attempt lawful; and no man is liable in a civil suit or criminal prosecution for an injury lawfully committed in self-defence upon an actual assailant. Doubtless the question whether the belief was reasonable or not, must, in either proceeding, be ultimately passed upon by a jury; and the assailed judges at the time, upon the force of the circumstances, when he forms and acts upon his belief at the peril, that a jury may think otherwise and hold him guilty. But in the language of Judge BRONSON, in the thoroughly considered case of *Shorter* vs. *The People*, 2 Comstock 193, "he will not act at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true." And such is the law as cited by Judge SWIFT (2 Swift Dig. 285), from *Selfridge's case*, and as held on a careful review of all the cases in *Shorter* vs. *The People*, and in numerous other cases which may be found cited there, and in Bishop on Criminal Law, vol. 2d, page 561; and it is the law of the land. That part of the request of the defendant used the term "excusable," instead of "justifiable," in respect to the homicide, and the latter term would have been more accurate. But the import of the request is not materially varied by that, and we can not intend that it influenced the decision of the court.

2. The plaintiff, in answer to the defence made, denied that he was an assailant, and claimed that he was a bystander merely, and requested the court to charge the jury, in substance, that if they so found, he was entitled to recover, although they should also find the defendant to have been lawfully defending himself against his assailants, and the injury to the plaintiff accidental. That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defence, is liable to third persons for *any* and *all* unintentional, accidental injurious consequences which may happen to them, and the court so charged the jury. Although there are one or two old cases and some dicta which seem to sustain it, that proposition is not law.

It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Burroughs* vs. *Housatonic R. R. Co.* 15 Conn. 124. Is the rule differant in trespass, where the injury is the immediate and direct, though undesigned and accidental, result of a lawful act?

In respect to this question there is some confusion in the books, arising from two causes. First, the decided cases directly involving the point are few, but the question has been very frequently adverted to by way of illustration or argument, in cases where the point was whether case or trespass was the appropriate form of action. Such, with a single exception, were all the cases which the plaintiff has cited on his brief from our own or other reports in which the dicta originated. In all that large class of cases the dicta are thus thrown out *obiter*, and assume the fact, without determining it, that the party is liable in one or the other form of action. (See on this subject the remarks of SHAW, C. J., in *Brown* vs. *Kendall*, 6 Cushing 395.) And in the second place, accidents (cognizable in actions at law, and distinguished from those peculiarly regarded in equitable proceedings) resulting from lawful acts, differ in character, and the distinctions and the right use of terms to characterize them have not always been sufficiently appreciated or regarded. A careful attention to those distinctions and the authorities will, I think, enable us to determine the question in hand with entire satisfaction.

An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made.

In the first class are all those which are *inevitable*, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class those which result from human agency alone, but were *unavoidable under the circumstances*; and in the third class, those which were *avoidable* because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care

which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if *A* burn his own house and thereby the house of *B*, he is liable to *B* for the injury; but if the house of *A* is burned by lightning, and thereby the house of *B* is burned, *A* is not liable; the accident belongs to the first class and was strictly inevitable or absolutely unavoidable. And if *A* should kindle a fire in a long unused flue in his own house which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of *B*, the accident would be unavoidable under the circumstances, and belong to the second class. But if *A* when he kindled the fire had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of *B*, and so was guilty of folly, he would be liable although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate.

And so, to apply these principles to this case;—if the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result, or if his aim was perfect but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol, and in either case the ball by reason of the diversion had hit the plaintiff, the accident would have been so effected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And, in the second place, if while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what

has been correctly termed "unavoidable under the circumstances," and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act though strictly lawful and necessary was done with wantonness, negligence, or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.

In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority.

If the question is to be settled upon principle it seems very clear that the form of the action should not be regarded, for the liability of the defendant must be determined by the nature of the accident, whether avoidable or unavoidable under the circumstances, or inevitable, and not by the fact that the injury was direct or consequential. The *foundation* of that liability in every case of accident, where it is the result of human agency uninfluenced by the operations of nature, and the act is lawful, is really *negligence*. This is true of collisions between vessels on the water, or horses or vehicles and persons upon the land, which constitute the largest class of cases, for, as the accidents result from steering or driving and are therefore direct injuries, trespass is the only remedy. So when a man in firing at a mark unintentionally wounds another, the injury is direct and the form of action is trespass, but the ground of liability is negligence in doing an unnecessary and avoidable though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident. As therefore the foundation of the liability is the same in both cases,

irrespective and independent of the question whether the injury was direct or consequential, there is no reason for any distinction in respect to the justification in the two actions.

And to that effect is the current of authority. In England the dicta cited from Raymond were disregarded by a majority of the court in *Scott* vs. *Shepherd*, although urged by BLACKSTONE, J., who dissented, and the *decision* is in point for the defendant. No case in point for the plaintiff is cited upon his brief. The case of *James* vs. *Campbell*, 5 Car. & P. 372, is not so, for in that case Campbell the defendant and another were fighting unlawfully, and in breach of the peace, and while thus fighting and attempting to hit his antagonist, Campbell hit the plaintiff who was a bystander. But there the act was every way avoidable.

Mr. Hilliard, in his work on Torts, vol. 1, chap. 5, sec. 9, so states the law, and cites the English case of *Wakeman* vs. *Robinson*, 1 Bingham 213, and the case fully sustains him. The action was *trespass* for driving against the horse of the plaintiff, and the rule of law recognised by the court as applicable to the action is stated in the head-note thus:—"If one does an injury by unavoidable accident an action does not lie, *aliter* if any blame attaches to him though he be innocent of any intention to injure." If there be any later case overruling that, it has not been pointed out to us, or fallen under our observation. As late as 1860, and in the tenth edition of Roscoe's Digest of the Law of Evidence at *Nisi Prius*, that case is cited as law.

In this country, though the cases are few, they are all, so far as we are informed, with the defendant. In the case of *Vincent* vs. *Stinehour*, 7 Verm. R. 62, which was an action of trespass against the defendant for driving a horse and sulkey against the plaintiff, the defendant claimed that the accident was unavoidable under the circumstances, for that his horse became ungovernable and the injury could not be prevented by prudence and care, and the Supreme Court in an elaborate opinion held that a defence. In *Brown* vs. *Kendall*, 6 Cushing 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a bystander, while raising a stick to strike and part two dogs which were fighting. This was the precise case put for the purpose of illustration by some of the English judges, as cited on the brief of the plaintiff's counsel. Yet the court in Massachusetts, Chief Justice SHAW giving the opinion, held that the defendant was not liable "unless the act was done in the

want of the exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." The same principles are recognised by the Supreme Court of the state of New York, in the case of *Bullock* vs. *Babcock*, 3 Wend. 391, although they were not applied because that was a case of avoidable accident, the injury having been inflicted by an arrow while shooting at a mark without reasonable care. And it is sufficient to add that the case of *Vincent* vs. *Stinehour* was cited by Judge WILLIAMS, in giving the opinion in *Burroughs* vs. *Housatonic R. R. Co.*, 15 Conn. 131, with evident approbation, although, as the case did not call for it, the principle involved was not in terms adopted. But the broad proposition subsequently stated without qualification in respect to the form of action, that "where there is neither negligence nor folly in doing a lawful act, the party cannot be chargeable with the consequences," tends to show the inclination of his mind, and we cannot doubt that if the case had required it, the rule as settled in *Vincent* vs. *Stinehour* would have been adopted by the court.

Such are the general rules of law applicable to accidental injuries by which we must be governed in deciding the question as raised on the motion. But we are not insensible to the fact that the danger of accidental injury to third persons from the use of fire-arms, even in lawful self-defence, is comparatively very great, that the bearing of these arms is becoming needlessly general and their use in populous places and thoroughfares quite too frequent, and that some further protection to the public from injury by them seems necessary. That protection might be afforded by us perhaps, if we should hold, 1st, the use of fire-arms, even in lawful self-defence, to be attended by so much contingent danger to innocent third persons that accidental injuries by them should be deemed exceptional and wholly inexcusable as matter of law, or inexcusable unless the defendant should show that they were inevitable or absolutely unavoidable; or 2d, that *all* such injuries should be deemed *primâ facie* negligent, and that it should be left to the jury to say whether in the particular case the danger of injury to third persons was so slight and improbable that the case was exceptional, and the defendant wholly free from blame, either in having or using the instrument. It is obvious, however, that if we should thus introduce an exception into the law to meet new contingencies we should be going

beyond the exigencies of this case (there being other errors), and encroaching upon the peculiar duties of the legislative branch of the government; and to that branch, with this statement of the condition of the common law, and suggestion in respect to the importance of a remedy, we must leave the matter.

We advise that a new trial be granted.

In this opinion the other judges concurred.

This case may be regarded as important upon both points raised and decided, although in regard to the first question there is little ground of doubt.

I. The very necessity of the case, in self-defence, presupposes that the party must be permitted to act upon appearances, but if he acts rashly, or negligently, he is responsible for consequences, as well to the party whom he mistook for an assailant, as to all others accidentally damaged by reason of the rash or negligent attack on his own part. This is declared in Levett's Case, cited in Cook's Case, Cro. Car. 537, 538, where the master of the house, supposing his house attacked, in the night-time, by burglars, rushed down stairs, with his drawn rapier, and seeing the glimpse of a servant girl of one of the neighbors, whom one of his own servants had secreted in the buttery, and mistaking her for a burglar, thrust her through the body, by which she died immediately, and was held guilty of no crime. And the same was maintained in an early case, where the gamekeeper shot the owner of the preserve, mistaking him for a deer-stealer, and it was held excusable homicide. The same doctrine has always been maintained in the English courts, and is the established rule in America: State *vs.* Scott, 4 Iredell (N. C.) 409; Stewart *vs.* The State of Ohio, 1 McCook 66; Oliver *vs.* State of Alabama, 17 Alabama 587. This rule of the common law is too well established to admit of question. In cases where life is concerned, there is no doubt it should be held under severe restraint, and especially where firearms are resorted to. But we do not perceive any safer rule than that of the common law, that the party be allowed to act, and to carry his action to the extreme limit of taking life, where he, upon just grounds, earnestly believes his own life to be in peril, and there is no way of escape open to him. And the rule will equally apply where he is under the same apprehensions of grievous bodily harm, for the law does not require men to incur such peril of life or limb, looking to the law for redress. In all such emergencies the primary laws of nature revive, as against the outlaw; and one who puts himself in the place, or presents himself in the guise of an outlaw, or a murderer, or burglar, must be content to be treated according to his apparent character. This is not a point, at the present day, open to much discussion.

II. The other question decided in the case might seem, at first view, more doubtful. But we believe it will be found, upon careful analysis, equally free from doubt. The question here is not, as in Leame *vs.* Bray, 3 East 593 *f*, and that numerous class of cases, whether the action shall be trespass, or case; but whether any action will lie, for an accidental injury, or damage, resulting from a *lawful act.* For so long as the act itself is not lawful, there is no question the agent is legally responsible, in some form, for all the direct and natural consequences of his

act. That was decided in the leading case of Scott *vs.* Shepherd, 2 Black. 892. 1 Smith's Lead. Cas. 210. But the question in the principal case before us is, whether, if the act done in self-defence is done upon a justifiable excuse, and in a prudent and careful manner, the agent is responsible for any unforeseen and accidental consequence of the act, whether direct or indirect. It would seem there could be but slight doubt in regard to a proposition of this kind.

It is not whether the use of firearms is allowable in self-defence. That has been settled, by common consent, ever since their invention. It is much the same question as their use in war. Self-defence is war; private war; allowing the party to resume, as against an outlaw, or one who comes in the guise of an outlaw, the primitive rights of a state of nature, the ante-social state, and to repel force by force.

Neither is it the inquiry, whether firearms may be used in self-defence in the midst of a melee, or street-fight. For the law does not require a man to use one mode of self-defence on one occasion, and not upon others. He has a right to use all the means which "God and nature have put into his hands." It is the primitive war of natural forces; and he is not obliged to mete them out with a scrupulous regard to possible consequences to others. Others must be content to take their chance, as they do in regard to other legal acts; or as they do in regard to all accidental consequences, where no one is in fault. If the law of self-defence requires qualification, in consequence of the more destructive character of the instruments of modern warfare, it should be done by the legislature rather than by the courts.

This doctrine is very ably defended by SHAW, C. J., in Brown *vs.* Kendall 6 Cush. 292; and by WILLIAMS, C. J., in Vincent *vs.* Steinhour, 7 Vt. 62. It is well said by LAWRENCE, J., in Leame *vs.* Bray, *supra*, and, as applied to the present question, by SHAW, C. J., in Brown *vs.* Kendall, *supra*, that if the agent is to be made responsible, he must be so to the full extent; and if death ensue it will be manslaughter. at the least. The result of this will be, that if, in self-defence, where one may kill his assailant, he should accidentally kill another, he would be liable to punishment for manslaughter. It is very obvious no such consequence could flow from a lawful act.

The late case of Hummach *vs.* White, 9 Jur. N. S. 796, has some bearing upon the question before us. It was there held that where one took a horse, purchased the day before, into a crowded street to train him, and the horse becoming restive, rushed upon the sidewalk, or pavement, and killed a man, rightfully there, there could be no action, civil or criminal, maintained against such rider or owner of the animal, without distinct affirmative proof of negligence on his part. The mere happening of the injury or damage is not evidence to be submitted to the jury. There must be some distinct affirmative evidence of negligence, to entitle the plaintiff to go to the jury.

I. F. R.

The Provisional Court for Louisana.

UNITED STATES *vs.* AUGUSTUS REITER.

UNITED STATES *vs.* JOHN LOUIS.

At the time of the establishment of the Provisional Court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation.

In a country so held, the authority of the occupying force is paramount, and necessarily operates the exclusion of all other independent authority in it.

Government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want.

The establishment of the Provisional Court for Louisiana, by the President, as Commander-in-Chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations.

So long as the authority of the United States shall continue, the right and the duty of it as the party dominant there to afford to the country a government will continue.

Said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its commission shall remain unrevoked and the power of the United States shall continue to support it in the exercise of them.

The accused were tried before Judge Peabody and a jury, and were severally convicted; Reiter of murder, and Louis of arson. After the convictions a motion was made in each case in arrest of judgment.

Whittaker, for Reiter.

Durant & Horne, for Louis.

Geo. D. Lamont, Prosecuting Attorney of the Court, for the United States.

PEABODY, J.—These two cases may without inconvenience or danger of confusion be considered together, although they have in fact no connection with each other. The same objection to the proceeding of the Court to pronounce sentence upon the accused and in arrest of judgment, is made by both the defendants, and although the objection is urged on different grounds in the two

cases, still the objection is proper to be considered on all the grounds in each case. It is urged that this court is not authorized to try these defendants, and that its proceedings have not the sanction of law in the premises. If for any reason this be the case, no further steps should be taken. If for any reason the authority is wanting in one case it is equally so in the other, and the court should refrain from going further in either case.

The accused have been indicted separately and tried separately on charges wholly different and having no connection the one with the other, and the consideration of their cases together rather than separately, now, is a matter of convenience solely.

One of the accused, Reiter, has been indicted for murder, in causing the death of his wife by violence.

The other has been indicted for arson, in burning a building used as a mansion or dwelling-house.

Each has been tried before a jury of this parish and been duly convicted of the offence charged in the indictment, and each is now before the court on a motion in arrest of judgment, and in each case the arrest is urged on the ground that the court is not authorized in law and has not jurisdiction to try the case.

The counsel for Reiter claim that the court, in its constitution and creation, had not *originally* the warrant of law to try the accused.

The counsel for Louis concede that the court had authority originally to entertain and try such a case, but insist that for causes occurring since, its authority has ceased; that certain steps taken in Louisiana toward the re-establishment of a civil state government have superseded the powers once possessed by the court, and that it is now without jurisdiction or power. The offences of which the defendants stand convicted, by the laws of Louisiana are punishable with death, and nothing would be more agreeable to the court than to proceed with the utmost caution in considering these objections to its jurisdiction.

The accused have been indicted, tried, and convicted under and pursuant to the law of the state of Louisiana.

The *first question* to be considered is whether the court has ever had, from the nature of its origin and constitution, authority to try cases like these; and if this question shall be decided in the affirmative it will remain to examine

The *second question*, namely, whether the power to try or the jurisdiction over such a case, once possessed by this court, has

been withdrawn or lost,—whether the court in fact has been in any way deprived of it by subsequent events.

It must be conceded that the court, in its origin and structure, is quite out of the usual course and novel. It has not its origin or foundation in any constitutional or legislative enactment—is not the creature of any regularly-organized constitutional or legislative body. Ordinarily the judicial tribunals of the land are the creations of the legislative departments either of the State or Federal government, and for the regularity of their creation and the character and extent of their powers depend on the action of the legislative branch of the one or the other of these powers. In such cases, the first thing to be done in ascertaining the legality or powers of a court, is to consult the constitution and legislation of the government from which it claims to hold commission, and in the letter of these is found the act of its creation and the extent and limit of its powers.

Not so with this Provisional Court, which depends for its existence on the law of nations, and on that part of the law of nations relating to war—the law by which parties and neutrals are guided in their treatment of each other in a state of war; and that portion of it which relates to and determines the rights and duties of a belligerent, a conqueror in the territory of an enemy and holding it in armed occupation. On that law must depend the decision of the question presented by this motion, of the validity in law and the powers of this court.

On that law alone must this court rely for the power and jurisdiction it has exercised for a considerable time, in a large number of cases involving amounts usually very large.

It was in that law that the President of the United States, pressed by the urgent wants of the community here, found his warrant for the establishment of this court in the midst of the country of an enemy held by him *jure belli* in armed belligerent occupation.

The authority of this court is derived from the President of the United States, the Chief Executive of the nation and Commander-in-Chief of its forces military and naval. It is conferred by an order, of which the following is a copy:

EXECUTIVE ORDER, ESTABLISHING A PROVISIONAL COURT IN LOUISIANA.

EXECUTIVE MANSION,
Washington, October 20, 1862.

The insurrection which has for some time prevailed in several of the

States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that state, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the state in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional Court, which shall be a court of record for the state of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be Provisional Judge to hold said court, with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty, and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal, and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge.

These appointments are to continue during the pleasure of the President, not exceeding beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and in the state of Louisiana. These officers shall be paid, out of the contingent fund of the War Department, compensation as follows.

* * * * * * * * *

Such compensations to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

ABRAHAM LINCOLN.

By the President:
WILLIAM H. SEWARD, Secretary of State.

WAR DEPARTMENT,
Washington, 23d October 1862.

I hereby certify that the foregoing is a true copy, duly examined and compared with the original of the Executive Order of the President of the United States, constituting a Provisional Court for the state of Louisiana.

Witness my hand and the seal of the War Department.

EDWIN M. STANTON, Secretary of War.

Attest: JOHN POTTS, Chief Clerk.

This order, by its terms, no doubt embraces cases like these under consideration, as indeed it does, perhaps, all others which can occur in life, or become the subject of judicial investigation. The language of the order "to hear, try, and determine all

causes, civil and criminal, including causes in law, equity, revenue, and admiralty," is clear and unquestionable, and embraces this class of cases, with all others of every description.

The president then sought to give power to this court to try and determine cases of this kind, and having made an order to that effect, has given it that power, if he himself had authority to confer it. The only question remaining to be answered on this point, is whether the President had authority to confer such powers and jurisdiction.

The authority of the President of the United States to create this court, and invest it with powers which should embrace these cases, depends, to some extent at least, on the Constitution of the United States, which creates the office exercised by him, and determines its functions. That Constitution, article 2, section 1, paragraph 1, declares as follows:

"The executive power shall be vested in a President of the United States of America."

It also provides, article 2, section 2, paragraph 1:

"The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States."

As President, Chief Executive, and Commander-in-Chief of the army and navy, he would not ordinarily have power to establish tribunals for the determination of questions civil and criminal, arising in civil life. Was there anything in the condition of affairs existing at the time the order was made which could give him the power to establish them, and if so, what was there in the condition of affairs then existing to give him power in this respect not ordinarily possessed by him as one of the attributes of his office?

Between the Government of the United States and a people inhabiting a portion of country lying on the Atlantic Ocean and the Gulf of Mexico, and extending north beyond the northern boundary of the territory in question, and embracing within its borders that section of territory theretofore known, and still most conveniently designated, as the State of Louisiana, a war had for some time been waged. This fact is notorious, and moreover it is conclusively settled by the President, the ultimate arbiter of the fact, by his proclamation to that effect. As to its existence, therefore, as well as the existence of some other facts to which I shall have occasion to refer, equally well known, no time will be consumed in attempting to prove them, but they will be assumed.

It is a matter of public knowledge and notoriety that this war had been pending, and that the country over which the jurisdiction of this court is in question, and heretofore known, and in the order establishing this court described as the State of Louisiana, had been for many months held and occupied by those people and their forces, military and naval. That it had been for a long time previous to, and also since the commencement of this war, inhabited, cultivated, and owned by the same people who had entered into and carried on war with the Government of the United States, and that it was still so inhabited by a people whose relations with the Government of the United States had for some time been and were still those of enmity. That it had, in the course of the war, been by force of the arms of the United States wrested from the enemy, and was at the time the order establishing this court was made, held by the forces of the United States in armed belligerent occupation. That the armed belligerent forces of this enemy of the United States had been, by force of the arms of the United States, expelled from this country, and that they were at the time held out of it by the armed forces of the United States, and that war was still waged between those belligerents.

The civil institutions of the country thus held, including the tribunals for the administration of justice, had been formed and established by the enemy of the conquering power, and were by it administered at the time of the conquest.

These institutions having been formed, established, and administered by the Government existing previous to and at the time of the conquest confessedly hostile to the Government of the United States, were the only institutions found there at the time the military authority of the United States was by force of its arms established there.

By the conquest of the country, in this case as in others, the previously-existing government and the power by which it was administered were subverted and swept away, and those of the conquering power were substituted in their places. This is the necessary consequence of a conquest of a country—a transfer of the control, government, and sovereignty of it from one party to another.

The old power is conquered and extinguished, and the new one of the conqueror is instituted in its place. The old institutions, if not abandoned and extinguished, are at least suspended in their action.

They may be transferred to and adopted by the new governing power and may be used and operated by it, just as an old machine, detached from the power that has usually moved it, and abandoned for use as a whole, may furnish isolated pieces of machinery which can profitably be introduced into a new machine having different qualities, moved by a new and wholly another power, and used to accomplish on the whole, perhaps, purposes quite different. However there may be retained in use by the new governing power some of the features or institutions of the government which has been supplanted, it is nevertheless wholly another government, and derives its life and all its vital qualities from a new source—the new sovereignty installed by the conquest. A conquest necessarily operates the extinguishment of the power of the party conquered in the country which is the subject of conquest, and the establishment there of the power of the conqueror. Without this there is no conquest of a country, and there can be none.

When the power previously dominant in a country has been extinguished by that of another party, and rendered incapable of governing it further, and a new one has been established in its stead, it is both the right and the duty of the party thus coming into power to see to it that a government wholesome and salutary shall be established and administered, and, as in such a case there is only one power, that of the new party succeeding, capable of giving and administering the government, it follows that it is the duty as well as the right of that power to do it.

No country can exist without a government of some kind. The rights of the inhabitants must be protected—crime must be restrained and punished—the virtuous must be protected against the vicious—the weak against the strong—order must be preserved and security to person and estate assured. The party dominant for the time being has the power to do it, and no one else has the power, and it follows from the necessity of the case that he must exercise it.

So the Government of the United States, having conquered and expelled from the territory of country, theretofore known as the State of Louisiana, the power by which the government of it had been theretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft a government in the place and stead of the one deposed or overthrown,

such an one as should reasonably secure the safety and welfare of the people thus reduced to subjection; in some manner, not inconsistent, to be sure, with the proper interests of the governing power, and the maintenance of it in its supremacy there.

The power established there was the military power of the United States, and the President of the United States, as we have seen, the Commander-in-Chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed.

He acted in obedience to this duty, and in accordance with this right, when he attempted to establish there a judicial tribunal capable of deciding controversies and administering justice.

But how does this question stand on the authority of adjudged cases?

In the case of *Cross et al.* v. *Harrison*, in the Supreme Court of the United States, in 1853, reported in 16 Howard, at page 164, the Court held that a civil government formed in California, under the direction of the President of the United States, as Commander-in-Chief of the army and navy, shortly after the conquest of the country, and while it was held in military occupation by the forces under him, was an act warranted by the laws of nations, and that the formation of such a civil government was the rightful exercise of a belligerent right over a conquered country.

It appeared that the port of San Francisco had been conquered by the arms of the United States in 1846, and that shortly afterwards, the United States holding military possession of all Upper California, the President authorized the commander of the forces of the United States there, to exercise the belligerent rights of a conqueror, and form a civil government for the conquered territory, with powers to impose duties on imports and tonnage, for the support of the government and of the army which held the country as a conquest in possession. This was done, and duties were levied and collected for a time. Afterwards, a treaty of peace was made with Mexico, by which Upper California was ceded to the United States.

After this treaty, and after the cession to the United States of the territory, the Military Governor continued to collect

import and tonnage duties as he had done before, but at the rate authorized by Acts of Congress in other parts of the United States; and for that purpose appointed the defendant in this suit collector there. He, as such collector, without any legislation of Congress on the subject, collected those duties to a large amount from the plaintiffs, who sought in that suit to recover them back again.

The question presented was, whether the United States, after the cession of this territory to it, and in the absence of any legislation by Congress on the subject, had a right by its Military Governor to collect those duties. The Governor, it appeared, collected them of his own motion, and without any instructions on the subject from his government at home. No question of the right of the government to levy duties as it pleased, while the country was held by right of conquest in strictly military occupation, appears to have been made; but the continuance of that right after the treaty of peace, and after the cession of the country to the United States, seems to have been chiefly in question. The Court sustained the right in the broadest manner, putting their decision on the ground that the formation of the civil government when it was done, was the lawful exercise of a belligerent right over conquered territory. That that government being in existence when the territory was ceded to the United States, its powers did not cease by reason of the cession of the country to the United States, or of the restoration of peace, and that it was rightfully continued after peace was made with Mexico, until Congress should legislate otherwise.

The decision covered the whole ground that the duties were lawfully collected by the Civil Military Governor of California, an instrument of the provisional government of the United States in that country whilst the military occupation was continued; and that it was so afterwards from the ratification of the treaty of peace until the revenue system of the United States was put in practice, under Acts of Congress passed for that purpose; in effect deciding that the provisional government of the United States there was rightful and legal, and that it continued in force a legal rightful government through the time the country was held in military occupation, and after that occupation ceased, and that it was, in fact, in force until some other system was provided according to law to supersede it.

For the doctrine that a conqueror in a conquered country may establish a government and courts for the administration of justice, the case of *Leitensdorfer et al.* vs. *Webb*, decided by the Supreme

Court of the United States, in 1857, reported in 20 Howard 176, is an authority directly in point. In that case the conduct of the Government of the United States by General Kearney, the officer in command of its forces there, was brought in question. It appeared that after the conquest of that country by the arms of the United States, General Kearney, in command of the forces there, established a government and provisional courts for the administration of justice.

Those courts, in the case referred to, were adjudged to be legal, and their decisions obligatory as warranted by law. The power to establish the government and the courts was directly in question, and was directly passed upon by the court, and was sustained on the ground of the right of conquest.

In that case, moreover, it appeared that the country conquered was subsequently, by treaty, ceded to the United States, and it was claimed that by the act of cession the right of the United States to govern the country and enforce the laws made by the Provisional Government while it was held in military occupation, was terminated.

It was not seriously questioned that the United States might, while it held the country in military occupation, establish and administer a system of government—make laws by which to govern the inhabitants and regulate their rights and intercourse among themselves, and set up courts by which the laws so made should be administered. That right was deemed to be too evident to be seriously questioned. It was, however, in issue, and was necessarily passed upon by the court. The doctrine chiefly contended for, was that by the cession of the country to the United States, the right to govern it by that provisional system adopted when it was held a conquest of arms, was terminated, and that the United States had, after the cession, only the right to govern it like other territory of the United States, by laws emanating from Congress—the constitutional law-making power of its own Government—enacted in reference to it as territory of the United States.

This position was not sustained by the court, but was overruled and adjudged not warranted in law.

The court says: "Of the validity of these ordinances of that Provisional Government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no

doubt, that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever might have been the rights of the occupying conqueror, as such, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest, every institution which had been overthrown or suspended would be revived and re-established.

"The fallacy of this pretension," the court proceed to say, "is exposed by the fact, that the conquered territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute, permanent dominion and sovereignty." The Court then proceed to decide when the institutions of the provisional government would terminate.

They say: "We conclude, therefore, that the ordinances and institutions of the provisional government could be revoked or modified by the United States alone, either by direct legislation on the part of Congress, or that of the territorial government, in the exercise of powers delegated to it by Congress." The question there presented was the validity of an ordinance of the territorial government, authorizing attachments of property of debtors, enacted by the provisional government, while the country was held in military occupation, and before the cession of it, but sought to be enforced by the Provisional Territorial Court after the cession of the country to the United States, and after the military occupation had ceased. The Court upheld the law in its origin, and also in its continuance in force, and the administration of it by the Provisional Territorial Court after the cession of the country, and after the military occupation had ceased.

In the case of *Jecker* vs. *Montgomery*, 14 Howard 498, decided in 1854, the same Supreme Court of the United States incidentally recognise the legality and powers of those provisional courts, and while deciding that, for reasons peculiar to cases of prize, and not at all applicable to any others, they could not legally act in cases of that class, the court admit their powers and jurisdiction in other cases: making three decisions of the court of last resort of the Government of the United States quite in point. Either of these should be sufficient authority for such

a principle, if indeed a principle so plainly proper and necessary, can be thought to need authority of precedent at all.

But at the risk of being tedious and doing work of supererogation, which charges I am persuaded might well be maintained against me, I will add to these authorities already commented on, still another one, which has a bearing quite material on this case at more than one point. I mean the case of *The United States* vs. *Rice*, 4 Wheaton 246. That case, as well as those already cited, decides that by the conquest and military occupation by one nation of a portion of the territory of another, the portion so acquired passes from the operation of the laws and government of the nation to which it had previously belonged, and comes under the laws and government of the nation making the conquest. It also decides that while such territory is held by the conqueror, it is the right of the party so holding it to govern it, and for that purpose to make laws by which to govern it. That while a portion of territory is so held, the laws of the conqueror holding are in force there, and the laws of the party from whom it has been taken are in abeyance not only *de facto* but also *de jure;* that while it is so held, the conqueror has *de jure* as well as *de facto* all the rights of dominion and sovereignty over it, and may exercise them at his pleasure, and that the former sovereign, overcome or expelled, has no right there, and his laws have no effect there; that acts done there with the authority of the conqueror are legal and proper, but those done in violation of his laws, even though done in obedience to the laws of the sovereign expelled, are not legal, but contrary to law. In short, that, by conquest, the sovereignty and right to rule of the conqueror are introduced and established, and the sovereignty and right of rule in the party expelled are extinguished; and that the duty of allegiance in the people remaining there is transferred in like manner from the vanquished to the victorious party; in fact, that by such an act the change of the sovereignty and allegiance are complete, and new rights and duties in both parties are created accordingly. I think that all these conclusions certainly follow from what is decided, if, indeed, they are not all actually decided there.

That case, like each of the others cited, was decided by the Supreme Court of the United States—the court of highest human authority on that subject—and as the decision was against the United States, and in favor of the authority of Great Britain,

its enemy in the war, and was made shortly after the occurrence of the war out of which it grew; and while no department of this government was inclined to magnify the rights of Great Britain or disparage those of its own government, there can be no suspicion of bias in the mind of the court in favor of the conclusion at which it arrived, and no doubt that the law seemed to the court to warrant and demand such a decision.

That case grew out of the war of 1812, between the United States and Great Britain. It appeared that in September 1814, the British forces had taken the port of Castine, in the state of Maine, and held it in military occupation; and that while it was so held, foreign goods, by the laws of the United States subject to duty, had been introduced into that port without paying duties to the United States. At the close of the war the place was by treaty restored to the United States, and after that was done the government of the United States sought to recover from the persons so introducing goods there while in possession of the British, the duties to which by the laws of the United States, they would have been liable. The claim of the United States was that its laws were properly in force there, although the place was at the time held by the British forces in hostility to the United States, and the laws, therefore, could not at the time be enforced there; and that a court of the United States (the power of that government there having since been restored) was bound so to decide. But this illusion of the prosecuting officer there was dispelled by the court in the most summary manner. Mr. Justice STORY, that great luminary of the American bench, being the organ of the court in delivering its opinion, said: "The single question is whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. * * * We are all of opinion that the claim for duties cannot be sustained. * * * * The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance of the British government, and were bound by such laws, and such only, as it chose to recognise and impose. From the nature of the case no other laws could be obligatory upon them. * * * * * Castine was therefore, during this period, as far as respected

our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States." The court then proceed to say, that the case is the same as if the port of Castine had been foreign territory, ceded by treaty to the United States, and the goods had been imported there previous to its cession. In this case they "say there would be no pretence to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable." They add at the conclusion of the opinion: "The authorities cited at the bar would, if there were any doubt, be decisive of the question. *But we think it too clear to require any aid from authority.*" Does this case leave room for a doubt whether a country held as this was in armed belligerent occupation, is to be governed by him who holds it, and by him alone? Does it not so decide in terms as plain as can be stated? It is asserted by the Supreme Court of the United States *with entire unanimity*, the great and venerated MARSHALL presiding, and the erudite and accomplished STORY delivering the opinion of the court, that such is the law, and it is so adjudged in this case. Nay, more: it is even adjudged that no other laws could be obligatory; that such a country, so held, is for the purpose of the application of the law of its former government to be deemed foreign territory, and that goods imported there (and by parity of reasoning other acts done there) are in no correct sense done within the territory of its former sovereign, the United States.

No part of the remarks of the court in this case is more fully warranted or proper than the last, to the effect that *the case is too clear to require aid from authority.*

The right, therefore, of a conqueror in a conquered country to ordain a system of government for it, and among other institutions to erect courts of justice, and maintain them in the discharge of their proper functions, is as well established and free from doubt when considered on authority, as it is in principle; and about as well in each as any proposition which could find among men an advocate to question it, could in the nature of things be expected to be.

But it may be said that this reasoning, if correct as to territory foreign to the conqueror, and as to which his rights and duties are simply and solely those of a conqueror by force of arms, is

not applicable to the case in question, for this Louisiana is a part of the territory of the United States, over which the powers and duties of the President and the other departments of the Government were already fixed, and are dependent on the Constitution and laws of the United States, and limited to the powers and duties conferred by them; and that those laws do not give the President the power to establish a court like this, and therefore that he has not that power.

'It is quite certain that ordinarily he would have no such power; and hence, instead of looking for it to the Constitution and laws of the United States alone, I have looked elsewhere and to other facts than his merely occupying the place of President at the time. I have invoked also the fact that he was by virtue of that office, as commander of the forces of the United States, holding in armed belligerent occupation the country in which the court was established, and in which its powers and authority are now brought in question.

Is this country, for the purpose of determining the powers and duties of the commander-in-chief of the army and navy of the United States, to be deemed domestic, or is it to be deemed foreign territory? What are the relations of the forces of the United States, and of their commander, to these districts of country as they enter them, expelling the forces of the enemy? Is he the chief executive of the country of which these districts are a part, and is he nothing more; and are his powers and duties those of chief executive only? Has he in this country subjected to his arms, and while in armed belligerent occupation of it, with the forces under his command, has he by law the same powers and duties as he would have in Massachusetts or New York in time of profound peace, and has he no others? Has war given him no powers in law in addition to those possessed by him in time of peace? Having in war broken down the hostile power of it, and driven its forces out of it by the military force under his command, has he no new powers there by reason of that fact? When his subordinate officer, Admiral Farragut, landed there from the deck of the Hartford, did he carry with him no right to power not commonly enjoyed by the President in other territory of the United States? Did his rights as conqueror cease the moment his power in that character was established? Having entered Louisiana as commander-in-chief, at the head of his forces victorious, was he at once remitted to the posi-

tion, powers, and duties of a peace president in times of peace, and limited to them? Had he none of the powers or duties of a conqueror in a country subjected to his arms? What was this country to do for a government when the old hostile one had been reduced and expelled? Was it to get along without one as best it could? Was it to do this until some new one could spring up to supply the want? Were all the rights of persons and property, natural and acquired, the right to life, security, liberty, and property, to be at once suspended, and was the rule of physical force to override them all?

The right of a conqueror to govern a country held by him by right of conquest, is well established on authority. The cases which establish this right, however, relate to the conquest of a country foreign to the conqueror, and as to which he has no rights and is under no restraints, except those which come from the fact of conquest alone, and not to one which is of right a part of his own proper domain. In this case, the territory over which the government of the United States had acquired, as we have supposed, some rights in the nature of rights of conquest, belonged of right to it as a part of its own domain, and it remains to be considered whether that fact makes any difference in respect to the right by the laws of war to govern a country conquered.

It may be said that the act of the United States in this case, had not the usual effect of a conquest of foreign territory; that instead of acquiring anew the rights of a conqueror, the United States by this conquest (as I for the sake of convenience have called it) has but removed the obstacles to the enjoyment of its pre-existing rights, and has not acquired any new ones of a conqueror.

As we have seen, the foundation of the right of a conqueror to govern conquered territory, and for that purpose to establish provisionally civil institutions in it, is necessity, and that chiefly the necessity of the conquered country and its inhabitants. A government of some kind they must have, for no community can exist without it.

The power of the conqueror has overridden and subjected all other power, and this necessity can be supplied from no other source than him, for he holds for the time being all power. Whilst this continues to be the case, what is there in the case in

question of Louisiana which should make it different from a foreign country?

The inhabitants of that country owed allegiance to, and were entitled to the protection of the government of the United States, it is said familiarly, and this is quite true in the sense in which the remark is usually made. But did the United States ever at any time, or under any circumstances, owe the people of this territory a protection and government which would supply all, or any considerable part of their wants in this respect?

If the government of the United States should afford to this country all the protection and aid—should perform for it all the governmental offices, which it by virtue of the Constitution and laws of the land was ever bound, or had a right to do, how far would this go towards supplying the wants of the country in that respect? Is it not quite certain, on looking into the law on the subject of the relations, rights, and duties of the Federal government to the tract of country in question, or any other tract embraced within the state, that with the Federal government in full function, and all its duties fully performed, a very small portion of the governmental necessities of the country would be supplied?

It is a fact familiar to us all, that under our system of government, almost all the governmental aid needed by our people is due to them from the local depositories of power, the state governments—for most purposes within their own territory sovereign. These governments, under our system, are the repositories of nearly all of the powers of government in ordinary times in familiar use among us, and whether they be applied by the state itself, by its own officers directly, or be allotted out in parcels to smaller governmental districts, such as counties or parishes, cities, towns, or villages, to be applied by the officers of those localities respectively, still the state and not the Federal government is the reservoir from which they are drawn, whether it be for distribution or exercise; and the state, and not the Federal power and officers, administer and execute them.

The man of commerce, the seaman, a traveller on the highway of nations, the soldier, whether at home or abroad, the direct instrument of the government, and at once its representative and defender; and the traveller in a foreign land, experience and realize the power and the protecting hand of the Federal government, its value and beneficence; but in the ordinary walks of life, at home, among plain people, very few—probably not one in a

hundred—have occasion in a lifetime to invoke or experience any office or effect, enabling or restraining, protective or punitory, of that government, whose duty relates in ordinary times and circumstances almost exclusively to the foreign relations of the country, happily almost always so secure and free from threatening aspect or cause of anxiety as to attract little or no consideration.

From which government comes the system of police by which order in society is maintained from one end of the land to the other? From which the judicial power—the one in question here and now—by which, in ordinary cases, crime is punished and repressed, controversies decided, and the rights of persons and property established and maintained? and what is certainly quite in point, from which source comes the power by which these very unfortunate criminals now before me would ordinarily on a basis of peace be tried, and justice be meted out to them? What law of the United States, as laid down in the Constitution and statutes thereof, did Reiter violate, when (forsaken of his God) he took the life of his wife, the partner of his bosom, on that hopeful holy morning of the anniversary of the birth of our Saviour, in the year of that event one thousand eight hundred and sixty-two? What law of the United States did Louis—poor benighted Louis—whose eyes have scarcely been blessed with the sight of himself free to seek his own security or happiness—violate, when he applied the fatal torch to the fated house, the residence of a human being?

It is quite certain that the government of the United States, remitted to its ordinary constitutional functions within one of the states as in times of peace, could not supply a government at all adequate to the necessities of society, and especially could not have taken cognisance of, or punished at all, either of the offences in question by any tribunal it ever had or had the right to establish.

The necessity for a provisional government here, for nearly all the purposes for which a government is necessary, and especially of a provisional tribunal for dispensing justice generally, and in cases like these now under consideration, was the same as, and none other than it would have been if this tract of country in question had been a part of the domain of a government wholly foreign to that of the United States, and over the territory of

which it had no other rights than those growing out of war and conquest.

Indeed, it may well be doubted whether, in reference to governmental rights and duties in matters of this kind, there is any difference between the citizens of the several states and those of foreign territory.

Certain it is from what has been said, that this territory is not, by the nature of our system of government, under the dominion of the Federal government as to most matters of local administration, but is exclusively under the state and local government, and the Federal government was never bound and never assumed or pretended to furnish government to any section of the states as to their internal or local matters generally, and has not, and never had the duty, right, or power to do so.

But this district of territory had been in insurrection against the government of the United States, had openly withdrawn from all connection with that government under the forms of law and civil legislation, had allied itself with others hostile and at war with it, and had, by force of arms, for a considerable time maintained this attitude external and hostile, resisting successfully the efforts of the government to subject it to law and duty.

However the act of secession was ineffectual in law, this district had in fact and practically withdrawn from all relations with the government of the United States, and had arrayed itself in armed hostility to it. Its duties remained unchanged no doubt, but its rights to the filial relation—its rights to receive from the Federal government the consideration and care of a parent rather than the imperious commands of a military master, may have been much changed by the events which had transpired, and I think that they had been. Having taken for itself the attitude of a foreign state, and that too of one hostile and at war with the United States, and formed and adapted all its civil institutions, and in every respect bent itself to that condition, and claimed and asserted it, and practically maintained it by force of arms for a time, and having been at this time overcome and subjected to the arms of the government of the United States, it may very well be that while it has acquired no new rights by virtue of its pretensions, it has resigned and forfeited old ones, and is no longer entitled to demand the benefits of a relation it has renounced and repudiated, however it may have failed in establishing at that time its freedom from the duties attendant upon it.

The counsel for the prisoners Reiter and Louis, however, take different grounds on this motion.

The former insists that the whole structure of the court in its origin was without warrant in law.

That inasmuch as the Constitution and laws of the United States give no authority to the President to establish such a court, he has none, and that his act in attempting to establish it is ineffectual, from want of constitutional and legal power in him.

While the learned counsel for the accused Louis concede that the President, as commander of the forces of the United States, had authority by the laws of war to establish it, and that it had originally all the powers by him attempted to be conferred, but insist that these powers have ceased, by reason, as I understand the argument, of the organization of a civil government here which supersedes the military. I pass to consider the question presented by this argument.

If a conqueror in a conquered country have a right to set up a government in it, when does that right cease? Or, rather, if he have such a right, and exercises it, when does the power of the government so set up cease?

I answer, first, it will terminate necessarily whenever the power which formed it shall terminate, or become unable to support it. And, secondly, whenever that power shall for any cause voluntarily bring it to an end.

That the power of the Federal government here has not been terminated, I need no argument to prove. It certainly has not been expelled, and it quite as certainly has not been withdrawn. It remains, we all feel and realize, the great, beneficent, paramount, and only power here; able ever to support and supporting itself, and furnishing and supporting every government office and function here.

But on this point, as well as the one to which I have cited the cases above referred to, some of those cases speak as authorities. In two of those cases, at least, in which the power of the provisional government and the provisional courts was sustained by the Supreme Court of the United States, it was so upheld in territory belonging, aside from military occupation and of right to the domain of the United States, and over which that government had powers of government, full and complete, for all purposes, as any sovereign or state has ordinarily within its own territory; rights not limited to its external matters alone, or chiefly, as are

those of the United States in territory lying within one of the states, but embracing powers for all the details of local administration, legislative, executive, and judicial.

And even there, where the United States had by the Constitution, powers of government ample for all purposes, the power to continue in force a provisional government long after military occupation had ceased, and when the rights of the United States there depended not at all on military power or belligerency, but wholly on compact between the former sovereign and itself—even there, in territory confessedly belonging to the United States, and in time of peace, and in the absence of military power or military necessity, the provisional government and the provisional courts were upheld to the fullest extent, and were adjudged to continue legally and practically in force as instruments of the Federal government until it should, by its constitutional action, through its legislature, otherwise provide.

In the earlier of those cases, *Cross* vs. *Harrison*, 16 How. Rep. 164, the court say: "Our conclusion from what has been said is, that the civil government of California, organized as it was, from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that until Congress legislated for it, the duties upon foreign goods, &c., were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, &c., from Governor Mason."

These cases, in deciding that a provisional government may be maintained by the military power of the United States in territory belonging to it, not held in military occupation, or *jure belli*, go far to prove that the fact that this country belonged, for some purposes, to the United States, aside from those coming from conquest and military occupation, did not take it from the application of the general principle that the conqueror in conquered territory, has the right to govern it and to establish government as he may deem expedient; but that such territory, on the contrary, is on the same footing in that respect as territory strictly and for all purposes foreign.

There is no pretence that the Federal government has in any manner directly brought, or sought to bring, the labors of this court to a close. Having established it, and bade it proceed in

the performance of its mission, it will continue (the power which established it continuing) until that power shall revoke its commission, or otherwise decree its discontinuance.

But it is said that a civil government has been established here, and that therefore the proper functions of the provisional one, and among others, the functions of the provisional court, have ceased.

It is quite true that some measures apparently tending to the establishment of a civil government have been taken. Members of Congress were elected in 1862, and were admitted to seats in the National Legislature. Several other officers—a Governor, Attorney-General, and others, have also been elected more recently under the direction of the military authorities. A convention for the revision of the constitution of the state has been elected and convened.

These things look like measures for the organization of a state government, and measures of this kind pursued may in course of time lead to such a consummation, at the pleasure of the Federal government.

That all these things have been done under and by virtue of the fostering care of the Federal government, as exercised by the military arm of it, no one at all acquainted with the facts will doubt.

Waiving for the present, however, as unnecessary to be considered here, the question whether these movements have their foundation in and derive their vital principle from the state or from Federal sources; and, whether in use, as some of them are, they are in fact instruments in the hands of the defunct state, or of the living Federal power, it is quite certain and sufficient for present purposes, that the Federal government has not voluntarily abdicated and resigned to them, all or generally, the functions of government, certainly not those of the Provisional Court.

Such a general surrender alone could have divested the power of this court, for there is no pretence that the Federal government has singled out certain powers, and among them the powers heretofore exercised by this court, and so parted with them as to be unable to recall or exercise them. The whole argument, on the contrary, proceeds on the idea that civil government, as a whole, has been established here, and all the power to exercise it resigned into the hands of state authorities.

In short, that the state is again in possession of all the govern-

mental powers which of right, under our system, belong to the state, in contradistinction to the Federal government, and that the United States retain only what are designed under our system of government, ordinarily to be exercised by the Federal government in all the states in times of peace, and that both parties are, in fact, remitted to their own positions in the constitutional government formerly occupied by them, and the same as are now occupied by the loyal states.

At the time this motion was made (and everything must relate to that time) there was not a court in the part of Louisiana within the Federal lines having any reasonable pretence of authority from any other source than the Federal government.

The United States District and Circuit Court, then in operation here, were and are the constitutional courts of that government. All else were creations of the military power of the Federal government.

The learned argument of Mr. *Lamont*, the prosecuting attorney of this court, on that point was entirely correct.

All the governmental functions in exercise here at that time, not only courts of justice, but all others, and all the judges, officers, and instruments by which they were performed and operated, were those of the Federal government, and were appointed, commissioned, animated, sustained, and moved by that power alone.

The Provisional Court for the state of Louisiana—the court of the Federal government—retains all the powers it ever had, and will continue to exercise rightfully a jurisdiction commensurate with its charter, so long as the President, or the government he represents, shall will it, and shall uphold it for that purpose; and whatever other institutions may have been brought, or allowed to come into existence in the mean time, this court will not cease, or go out of existence, or be shorn of any of its powers or proportions by reason of the fact that some modicum of them, or of other powers of civil government, have been allotted by the common parent—the Federal government—to other institutions or instrumentalities.

Something was said on the argument about the laws which these courts should administer. The laws of the conquered country, like everything else connected with its government, are entirely under the control and subject to the will of the conqueror. He makes and adopts them in use at his pleasure. Those found in use at the time of the conquest may be continued in use by

him or laid aside at his pleasure. If continued in use, however, they become his, and derive their force and efficacy from him and his adoption of them. In the cases cited above, a new code was made and introduced by General Kearney, representing the government of the conqueror, called the Kearney Code.

In the absence of any provision on the subject, in such a case courts of justice are not bound to adhere to any particular system. This court is commissioned to administer justice, and no code of laws is prescribed for it. It may adopt such rules as may seem wise and expedient, whether corresponding to the system in use here at the time of the conquest, or differing from it. It has always administered justice according to the Code of Louisiana, and so have all other courts here, not because it was *bound* by that code, as law of the state, but because it seemed expedient and wise to continue along under the system found in use here, rather than introduce a new one. That system had had the sanction of the previous state government, and was no doubt suited to the occupations, habits, and wants of the people. The transactions which would become subjects of investigation had been entered into under and in reference to it as the system by which they would be construed and enforced. Moreover, it was already in use, and had better be continued in use and a change avoided, unless for some decided cause a change was deemed necessary.

Having adopted that as the rule in the courts here, it became law to them as well as to society here, and they were bound to adhere to it and administer justice according to it so long as it continued to be the rule. The courts here have always done that, and it is not probable that the laws of Louisiana have ever been more closely adhered to in the administration of justice here than they have been during the time of the government of the country by the Federal authorities, since the occupation of it by their forces.

In the cases cited above from California, *Cross* vs. *Harrison*, 16 How. Rep. 164, *Leitensdorfer* vs. *Webb*, 20 Id. 176, and *Jecker* vs. *Montgomery*, 14 Id. 498, the previously-existing systems of law were ignored and a new and original system introduced, which course received the sanction of the Supreme Court of the United States in those cases; and in the case cited from Maine, *The United States* vs. *Rice*, 4 Wheat. 254, the British government made a new and different law and administered it

while the territory was held by it, and that course received the sanction of the same court of highest authority, in the case referred to.

I have not cited authority for everything I have said in this opinion—perhaps not for every doctrine I have declared. I have, however, referred to the court of highest authority in such cases of any tribunal known among men, and to the decisions of that court, quite in point, for every principle and doctrine claimed in this opinion, which is not so plain and evident as to make reference to cases for authority unnecessary and inexpedient, and for the omission to cite them to such points, I have the very high authority of the Supreme Court of the United States, in the case of *The United States* vs. *Rice*, 4 Wheat. 254, above referred to, that in cases like that "too clear to require aid from authority," it is not well to encumber an opinion with them.

In addition to the cases already commented on, I will refer to several more having important bearing on this question, not as establishing any new principle or sustaining any old one not better sustained by more modern and unquestionable authority already referred to, though equally conclusive of the principle with them; but as furnishing, perchance, to some mind, some new view, reason, or illustration of a principle better established on authority by cases already introduced.

Grotius De J. B. ac P. l. 2, c. , s. 5, *et seq.;* Id. l. 3, c. 6, s. 4; Id. l. 3, c. 9, s. 9, 14; Puffendorf, by Barbeyrac, l. 7, c. 7, s. 5; Id. l. 8, c. 11, s. 8; Bynkershoek, Q. J., Pub. I. 1, c. 6, 16; Duponceau's transl., 46, 124; Voet ad Pandect, l. 39, tit. 4, no. 7, *De Vectigalibus;* Id. l. 19, tit. 2, no. 28; Id. l. 49, tit. 15, no. 1; *United States* vs. *Hayward*, 2 Gallis. 501; *The Fama*, Rob. 106; *The Foltina*, Dodson 450; 30 *Hogsheads of Sugar, Bentzen, claimant*, 9 Cr. 191; Reeves Law of Ship. 98, *et seq.; United States* vs. *Vowell*, 5 Cr. 368; *United States* vs. *Arnold*, 1 Gallis. 348; s. c., 9 Cr. 106; *Empson* vs. *Bathurst*, Winch. Rep. 20, 50, Winch Entries 334, cited Poph. 176; s. c., Hutton 52; Com. Dig. *Officer*, H.

My conclusions, therefore, are: That at the time of the establishment of the Provisional Court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation.

That in a country so held, the authority of the occupying force is paramount, and necessarily operates the exclusion of all other independent authority in it.

That government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want.

That the actual military occupation of that territory by the United States has continued from that time to the present, and still continues, and the right and duty of government, therefore, continue with the United States.

That the establishment of the Provisional Court for Louisiana, by the President, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations.

That so long as the authority of the United States shall continue, the right and the duty of it as the party dominant there to afford to the country a government will continue.

That said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its commission shall remain unrevoked, and the power of the United States shall continue to support it in the exercise of them.

NOTE.—The counsel of libellants in the case of the *Bark Grapeshot*, referred to in the article on the Authority of the Provisional Court, ante p. 388, desire us to state that that case was transferred by written agreement of parties, and they believe that no case has occurred of a compulsory transfer of causes from the United States Courts to the Provisional Court.—ED. AM. LAW REG.

Supreme Court of Pennsylvania.

BARINGER *vs.* STIVER.

A married woman who has no separate estate cannot, as against her husband's creditors, acquire a title to property sold as his at sheriff's sale, by repurchase from the purchaser and giving a mortgage on the property for the whole purchase-money.

The opinion of the court was delivered by

AGNEW, J.—The facts of this case are within a narrow com-

pass, and present a single question: whether a married woman, who has no separate estate or known means of payment of her own, can repurchase from a purchaser at sheriff's sale the property which had been sold as her husband's, who continued in debt, by giving a mortgage for the whole purchase-money, all of which remains unpaid.

In *Gamber* vs. *Gamber*, 6 Harris 366, it is said that where property is claimed by a married woman, she must show by evidence which does not admit of reasonable doubt either that she owned it at the time of her marriage or else acquired it by gift, bequest, or purchase. In the case of purchase after marriage, it is said, the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by the husband. That case was followed by *Raybold* vs. *Raybold*, 8 Harris 311, which held that property purchased by a wife, paid for in her earnings and savings, is her husband's. He, it is there said, is still entitled to the person and labor of the wife, and the benefits of her industry and economy. These positions were emphatically reasserted in *Keeney* vs. *Good*, 9 Harris 349. Since those decisions these principles have been adhered to throughout numerous cases, in which it has been held that it was not the intent of the legislature, in passing the Married Woman's Act of 1848, to change the marital relation, or to place the wife upon the footing of a *feme sole*. It was intended to preserve to her, and to protect her *bonâ fide* separate estate, but not to make the law a means of fraud, or the wife a receptacle of her husband's means, into which they could be clandestinely thrown to the prejudice of his creditors: *Walker* vs. *Reamy*, 12 Casey 414; *Winter & Hartman* vs. *Walter*, 1 Wright 161; *Bradford's Appeal*, 5 Casey 513; *Bear* vs. *Bear*, 9 Id. 525; *Hallowell* vs. *Horter*, 11 Id. 378; *Rhoads* vs. *Gordon*, 2 Wright 277; *Aurand* vs. *Schaffer and Wife*, 7 Id. 363; *Gault* vs. *Saffin and Wife*, 8 Id. 307. In the last case READ, J., gathering up the sum of the former decisions, said: "It is now settled law that evidence that the wife purchased real or personal estate amounts to nothing unless it be accompanied by clear and full proof that she paid for it with her own separate funds—not that she had the means of paying, but that she in fact thus paid. This is a definite, precise, and just rule."

After all these decisions, the rule must be considered settled, and its application to real as well as personal estate; and it has

in fact no exceptions, though there are two or three cases which are seemingly so. In *Wieman* vs. *Anderson and Wife*, 6 Wright 317, the property was indisputably the estate of the wife, and was merchandise which, from its nature, was a subject of trade, and the court therefore held that the results of her ownership also belonged to her, at the same time remarking in reference to the doctrine of *Gamber* vs. *Gamber*, and the cases following in its train. "We stand by all those cases. We have no reason to qualify or doubt any of them." *Manderbach* vs. *Mock*, 5 Casey 43, in fact, perhaps, ought to have produced a different result in the verdict under the charge, but when it came into this court the facts established by the verdict could not be denied. I am not sure that this case did not overstep the verge somewhat, but it is sufficient to say that it was distinguished from *Gamber* vs. *Gamber*, the authority of which was distinctly recognised. *Conrad* vs. *Shomo*, 8 Wright 193, was also decided on its special circumstances, which were, that the purchase of the wife was paid for as far as payments were made with the money of the wife, who at the time had ample means distinctly shown from other sources, while her husband was a man of no property, and the judgment levied upon the property was obtained after her rights had fully vested. The case is expressly distinguished from *Gamber* vs. *Gamber*, by the judge delivering the opinion, though it also lies on the verge.

The title of Mrs. Baringer, tested by the principles of the foregoing cases, must fail. It is true, she is a purchaser in the sense that a deed has been made to her, and that she has given a mortgage for the purchase-money, which, according to the doctrine of *Patterson* vs. *Robinson*, 1 Casey 81, might be a good security to the seller to enable him to collect his debt. But *Patterson* vs. *Robinson* was not a case between the wife and her husband's creditors. It was merely a charge upon the land for purchase-money held good as between her and her grantor to prevent a grievous wrong being perpetrated under cover of her disability as a married woman. But a case nearer to the one before us, if not its exact counterpart, is *Robinson & Co.* vs. *Wallace*, 3 Wright 129. The pure and simple question was there raised, whether a married woman can acquire property by her *credit*. The court below doubtingly held she could; and that it would be protected from her husband's creditors, but in this

court it was held differently, and that her credit is nothing in the eyes of the law.

We adhere to the settled doctrine that it is only when the property acquired after marriage has been paid for with her own separate estate, clearly and satisfactorily established, it is hers, and is protected from her husband's creditors. To suffer a wife to purchase on credit, is to open a wide door for fraud. Its effect is to throw upon the creditors the burden of proving whose funds afterwards enter into the payments. For, starting with title founded on her credit, she must stand upon it until the husband's means can be shown to enter into the purchase.

The judgment is affirmed.

Supreme Court of Missouri.

THE OHIO AND MISSISSIPPI RAILROAD COMPANY, RESPONDENT, *vs.* WILLIAM M. M'PHERSON, APPELLANT.

The directors are the agents of the corporation, and not the corporation itself: and although they meet without the limits of the state creating the corporation. yet their proceedings will be valid and binding upon the company. Where the charter granted by the state of Illinois declared certain persons to be a corporation, and named the directors thereof, such directors could meet and act in the state of Missouri.

Where the directors named in the act of incorporation met and organized the company without the limits of the state granting the charter, one who has subscribed for the stock of the corporation by its corporate name, and paid instalments called for by the directors, is precluded by his own acts from denying the lawful existence of the corporation.

Where the corporators met without the limits of the state granting the charter, and elected a board of directors, and such board made a call for payment upon the subscription to the stock of the corporation, a subscriber to the stock cannot, when sued for the call thus made, object to the legality of such election. The parties thus elected are directors *de facto*, and the legality of their election cannot be inquired into collaterally, without showing a judgment of ouster against them in a direct proceeding for that purpose by the government creating the corporation.

This suit was commenced the 28th November, 1858, and was for the recovery of $1400 and interest, being a balance of the larger sum of $2000, subscribed by the appellant on the 28th of March, 1851, to the capital stock of the Ohio and Mississippi

Railroad Company, the respondent. There seems to be no dispute about the facts in the case, but about the law arising upon them. The facts as disclosed by the record, so far as are material to the questions arising, are as follows:—

The plaintiff was incorporated by an Act of the Legislature of the state of Illinois, approved February 12th, 1851; by the first section of which the persons named therein, "and such other persons as might associate with them for that purpose, are hereby made and constituted a body corporate and politic by the name and style of The Ohio and Mississippi Railroad Company, with perpetual succession," &c. The purpose of the corporation was the construction and operation of a railroad commencing at Illinoistown, on the east bank of the Mississippi, running thence to the east line of the said state in the direction of the city of Vincennes, in the state of Indiana. The act of incorporation vested the corporate powers of the company in a board of directors, to consist of not less than seven nor more than seventeen in number, and such other officers, agents, and servants as they should appoint; and named the first board, consisting of thirteen persons, who, by the provisions of the act, were to hold their offices until their successors should be elected and qualified; and provided that vacancies in the board might be filled by a vote of two-thirds of the directors remaining, the appointees to continue in office until the next regular annual election of directors, which was required to be held on the first Monday of September in each year, at such place as the directors might appoint. A meeting of the board appointed in the charter was held in the city of St. Louis, Missouri, on the 28th of March, 1851, at which certain rules and regulations as to the rights and duties of stockholders (not necessary to be detailed here) were adopted, and a form of obligation was prescribed, to be signed by subscribers for stock in the company. The following is the form of obligation thus prescribed, and is the same which was subscribed by the defendant, and on which this suit was brought, viz.:—

"We, whose names are subscribed hereto, do promise to pay to the Ohio and Mississippi Railroad Company, incorporated by the state of Illinois, the sum of fifty dollars for every share of stock set opposite to our names respectively, in such manner and proportions and times as shall be determined by such company in pursuance of the charter thereof, and of the preceding resolutions of the board of directors. Witness the day of , A. D. 18 ."

Four calls for payment of subscriptions to stock were ordered by the board, all at meetings of the board in the city of St. Louis; the first on the 25th of September, 1851, for two and a half per cent.; the second on the 19th of November, 1851, for seven and a half per cent.; the third on the 5th of August, 1852, for thirty per cent., and the fourth on the 12th of August, 1853, for the remainder (sixty per cent.), to be paid in instalments of five per cent. on and after the 1st of October, 1853, till fully paid, of which several calls the appellant had due notice. At the meetings of the board at which the first and third calls were ordered, there were present six of the thirteen members appointed in the charter, with, in one instance, one, and in another, two appointees of the charter members; the second call was ordered by a meeting of seven of the charter members, and two of their appointees; the fourth call was ordered by a meeting of directors, elected at a stockholders' election held in the city of St. Louis on the 6th of September, 1852—none of the directors in this meeting being charter directors. The appellant paid to the respondent on his liability arising upon his said subscription, on the 22d of March, 1852, the sum of $100, and on the 3d of September, 1853, the further sum of $500; and in an interview had between the defendant and the treasurer of the company on the subject of the appellant's said liability, after the year 1855, and after the completion of the road, he admitted his liability, and expressed his willingness to pay when called on. A meeting of the stockholders of the company was held in St. Louis on the 4th of September, 1854, in the proceedings of which the appellant participated, voting with the majority in the adoption of measures looking to the accomplishment of the objects of the corporation. The avails of stock sold were used in building the road, and the road was completed on the 30th of June, 1855.

J. R. Shepley, for appellant.—A corporation authorized to be constituted under an Act of the Legislature cannot accept any agreement payable to it, or for its benefit, until the prerequisites have been performed to give it a corporate existence: *Wilm. & M. Railroad* vs. *Wright*, 5 Jones Law Rep. 304.

All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the state granting the charter of incorporation, are wholly void: Ang. & Ames on Corporations, § 498; *Runyan* vs. *Coster's Lessees*,

14 Pet. 128; *Miller* vs. *Ewer*, 27 Me. 509; *Freeman* vs. *Machias W. & M. Co.*, 38 Id. 243; *Ohio & Mississippi Railroad Co.* vs. *Wheeler*, 1 Black, U. S. 286; *Bank* vs. *Adams*, 1 Pars. Sel. Cas. 548; *Bank of Augusta* vs. *Earle*, 13 Pet. 519.

If a corporation has no legal existence, or if any acts of a corporation are void, no act of a corporator or stockholder can give vitality to the one, or legalize and make valid the other.

There have never been any legal and valid calls upon the defendant for his subscription, or at any rate for that portion which still remains unpaid, even conceding that the board in the charter named were in existence; for,

1. All the calls were made at meetings of the board held in the city of St. Louis.

2. The third call was not made by a majority of the directors named in the charter. A majority of the board must be present to do any act: Ang. & Ames on Corp., § 501.

3. The fourth call was made when not a single member of the board of directors named in the charter was present, and only six members present. As the defendant has paid thirty per cent. of his subscription, it is entirely unimportant whether the first two calls, together only amounting to ten per cent., were legal or not. That has been paid, and an amount more than the twenty-five per cent. mentioned in the charter has been paid, so that, as to the calls, the question is narrowed down to the legality of the third and fourth calls, and about these it does not seem that there can be any serious question as to their invalidity.

S. T. Glover, for respondent.—The statute of Illinois (Sess. Acts of Ill. p. 89, 1851) created a corporation *per se*. Section 1 of this statute declares that certain persons "are thereby constituted a body corporate and politic by the name and style of The Ohio and Mississippi Railroad Company." Section 6 of the same statute (p. 92) appoints a board of directors, and vests in them "all the corporate powers of the company." Such a charter gave being to the corporation in perfect form the moment the persons named proceeded to use the granted franchises.

The directors who were appointed by the charter being legal directors, and the corporation having attained perfect existence, and being put fully into operation by their doing the work contemplated by the charter, it is immaterial whether subsequent directors were regularly and legally chosen or not. Any direct-

ors coming in by consent or acquiescence, and acting *colore officii*, would be *de facto* directors, and their acts would be valid: 4 Rawle 9; 12 Wheat. 70; Ang. & Ames on Corp., t. p. 104–5, and the cases there cited.

But there was nothing in the objection that the directors or corporators held their meetings in Missouri: 6 Conn. 429; 3 Duer 648; 14 Pet. 122. No good reason can be given for prohibiting such action: 13 Pet. 519. 27 Maine 509 is in point for defendant as to proceedings by a board out of the state being void. This case was ruled on a mistaken view of 13 Pet. 588. No reason has ever been advanced why a board cannot sit out of the state, while every other act can be done there.

The defendant, by contracting with the company, and by participating in the proceedings of the corporation, voting his stock, &c., is estopped to deny the corporate existence: 5 Ala. N. S. 807–8; 16 Mass. 87; 16 S. & R. 145. "If defendant accepted the charter and acted on it, * * * * it does not lie in his mouth to object:" 2 Mo. 137.

Irregularities and defects in organization, whether material or immaterial, cannot be drawn into view by a debtor as a defence to calls: 16 B. Mon. 7, 471; Redf. on Railroads 85; Id. 9; 1 Sandford 168; Ang. & Ames 85, 636; 16 Ala. 374; 16 S. & R. 145; 9 Wend. 351; 4 Denio 392; 27 Penn. 387; Grant on Corp. 292.

W. Homes, on the same side.

The opinion of the court was delivered by

DRYDEN, J., who, after stating the facts already set forth, proceeded:—A recovery in this case was resisted on two grounds: first, that the facts were insufficient to show an acceptance of the charter, and therefore the plaintiff was not shown to have any corporate existence; secondly and mainly, that the votes and proceedings of the stockholders and directors when assembled in St. Louis, beyond the bounds of the state granting the respondent's charter, were wholly void, and therefore that the calls which were ordered in St. Louis, and in one instance by a board elected in St. Louis, were invalid, and imposed no obligation on the appellant to respect them.

1. As to the corporate existence of the respondent. It is maintained by the counsel for the appellant, that no acts of the board of directors performed beyond the territorial limits of the

state from which the charter emanated could be a valid acceptance of the charter. In support of this position reliance is had chiefly on *Miller* vs. *Ewer*, 27 Me. 509. That was a writ of entry for a tract of land in which the demandants derived their title from the Bluehill Granite Company, incorporated by an Act of the Maine Legislature. On the trial it appeared that the meeting of the corporators was called for the organization of the corporation under its charter in the city of New York, and that the charter was there accepted, and the officers of the corporation (president, directors, and secretary) were chosen. At a meeting of the directors thus elected, held in the city of New York, a resolution was adopted directing the president and secretary to execute the conveyance under which the demandants claimed title. There was no proof that any meeting for the organization of the company, or for the choice of its officers, had ever been holden in the state of Maine; but there was proof that the company, by a person acting as its agent, transacted business in the state. The question involved in the case involved the validity or invalidity of the conveyance thus made by the president and secretary in behalf of the company. The court decided it was void, but placed its decision not on the ground that the board of directors ordering the execution of the conveyance met at a wrong place, but alone on the ground that the election of the directors by the stockholders having been held outside of the state, and because held out of the state was void, and gave the directors thus chosen no legal authority to convey or to direct the conveyance of the corporate property. The opinion in the case, while it denies extraterritorial power to corporators, concedes it to directors. The court says: "The directors of a corporation are not a corporate body; they are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents *beyond the bounds where the corporation exists.*" In the present case the charter created a corporation *in presenti*, and appointed a board of directors without the necessity of any action on the part of the corporators; and if any assent was necessary to infuse life into this body politic, the proceedings of these directors, although had beyond the bounds and limits of the state of Illinois, were, according to the authority quoted, a sufficient expression of that assent.

But aside from the question whether the action of the board of directors beyond the bounds of the state was a sufficient ex-

pression of assent to give vitality to the corporation, the appellant's position towards the respondent is such as ought to preclude him from denying its corporate existence. The case of *The Dutchess Cotton Manufacturing Company* vs. *Davis*, 14 Johns. 238, was a suit on a promise to pay the price of stock subscribed by the defendant. The court, on the authority of *Henriques* vs. *The Dutch West India Company*, 2 Lord Raymond 1535, held that the defendant having entered into a contract with the plaintiffs in their corporate name, thereby admitted them to be duly constituted a body politic and corporate.

The appellant having contracted with the respondent in its corporate name, paid his money to it as an existing living thing in answer to its corporate demands, and from year to year having attended meetings of its stockholders, and voted at elections and upon questions which clearly implied the respondent's existence, he ought to be estopped from denying what he has thus often and so solemnly admitted: *All Saints Church* vs. *Davis*, 1 Hall, N. Y. 191; *John et al.* vs. *Farmers' & Mechanics' Bank of Indiana*, 2 Blackf. 367; *Chester Glass Co.* vs. *Dewey*, 16 Mass. 94.

2. As to the invalidity of the calls. In the examination of the case under the first objection urged to the respondent's right to recover, I think I have shown that the first three calls, as they were ordered by the directors, the validity of whose appointment was not controverted, were subject to no valid objection, although ordered by the board when in session beyond the territorial limits of Illinois. But the alleged invalidity of the fourth call rests upon a total denial of official authority in those who ordered it. This call, as has been seen, was ordered by a board chosen by the stockholders of the company at an election in the city of St. Louis; and it is insisted, on the authority of the case of *Miller* vs. *Ewer*, already cited, that this election, by reason of the place where it was held, was a nullity, conferring no authority whatever on the persons chosen. I am not disposed to question the soundness of that decision in its application to the facts of that case, but I am unwilling to extend the principle there laid down to a case materially differing in its circumstances, as I think the one under consideration does. In that case at the time the obnoxious election was held the corporation had no existence—it had not yet come into being; and, there being neither corporators nor corporation, no valid official authority could be communicated by such election; but in this case, at the time the

election occurred to which objection is made, the corporation was, and for more than a year had been, in full life, exercising all the functions and franchises contemplated by its charter. After the corporation had become full fledged, I see nothing in reason or in principle why the stockholders might not as well elect directors as the directors a treasurer on the Missouri side of the line. The utmost that could be said under such circumstances is, that the election was irregular.

The corporation having been once put into existence, if the members of the board of directors—whether charter members or their appointees, or those elected by the stockholders in St. Louis—accepted their offices and acted under their appointment or election, as the evidence shows was the case, they became directors *de facto*, and their authority to act in behalf of the corporation could not be questioned by the appellant in this, a collateral suit, without showing a judgment of ouster against them in a direct proceeding by the Government for that purpose: *Trust. of Vernon Society* vs. *Hills*, 6 Cow. 23; *All Saints Church* vs. *Lovett*, 1 Hall, N. Y. 198–9; *John et al.* vs. *Farmers' & Mechanics' Bank of Indiana*, 2 Blackf. 367; Ang. & Ames on Corp., 3d ed. 104–5.

I find no error in the record. Let the judgment be affirmed.

BAY, J., concurred.

BATES, J., dissenting.—I hold that this election of directors by the corporators in the city of St. Louis (outside of the state of Illinois) was an absolute nullity: Ang. & Ames on Corp. § 498. The defendant's contract with the plaintiff was that he would pay "in such manner and proportions and times as shall be determined by said company, in pursuance of the charter thereof, and of the preceding resolutions of the board of directors."

The charter vested the corporate powers of the company in the board of directors. The resolution of the board of directors which preceded the subscription of stock, provided that the calls for payments on the subscriptions should be made by the board.

The persons who made the last call were not directors, the pretended election of them being an absolute nullity. There is nothing in the whole case which tends to show that the defendant in any manner, at any time or place, ever recognised them as